United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

original

74-1279

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No. 74-1279

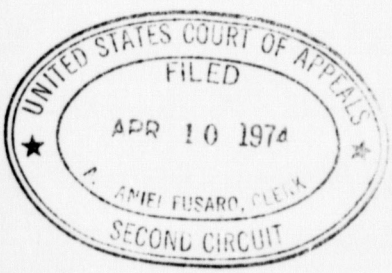
JORDAN BROWN and all others similarly situated,
Plaintiff-Appellee,

–against–

FIRST NATIONAL CITY BANK,
Defendant-Appellant.

ON APPEAL from the UNITED STATES DISTRICT COURT for the SOUTHERN DISTRICT of NEW YORK

BRIEF FOR AMICUS CURIAE



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Preliminary Statement

This brief is submitted by the New York State Bankers Association on behalf of the commercial banks of the State of New York, both state and national.

This Association joins in and adopts the arguments advanced in the brief for defendant-appellant, First National City Bank.

ARGUMENT

I. The District Court erred in holding that New York Banking Law § 108.5 does not authorize a check credit plan under which a Loan Agreement may provide for loans in multiples of $100 upon which defendant could charge interest at the rates provided in that section.

Subdivision 5 was added to Section 108 of the New York Banking Law in 1960. The bill was drafted by a committee of this Association in cooperation with the New York State Banking Department. The Department expressed its approval of the bill just prior to its enactment and considered it fair to both the public and the banking industry.*

A review of the provisions of the subdivision clearly indicates that it was the intention of the draftsmen and the Legislature to enact a broad flexible statute which would be adaptable to a variety of revolving credit plans. Within the prescribed limits as to maximum term, amount and rates of charge, banks were to be free to develop diverse plans designed to meet their customers' needs. To that end, the subdivision allows substantial latitude in terms and conditions. A bank may make loans or advances directly to its customer or make such loans or advances on his behalf. The loan instrument may be a check or some other written order or request. Interest may be calculated on any one of three different specified bases. A variety of repayment terms are authorized. Broad discretion is permitted in the allocation of payments.

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* *Statement of Richard S. Simmons, Deputy Superintendent of Banks of the State of New York before the New York State Joint Legislative Committee on Commerce and Economic Development,* November 30, 1959 ("As you know, the Department has been actively cooperating with the banking industry in regard to the drafting of the proposed bill before this Committee to amend Section 108 of the Banking Law by adding a new subdivision 5 thereto, which new subdivision will pertain to revolving credit plans. The Department is in favor of the enactment of such bill and considers it to be fair both to the public and to the banking industry.")

The District Court's holding that the statute must be strictly construed is, in the light of these contrary indicators, clearly erroneous.

In particular, we suggest that the Court failed to recognize a Legislative intent to permit program restrictions which would limit loans to those which were economically justifiable. In fact the authorization of the $.25 check charge was inserted (in paragraph (e) of the subdivision) to discourage borrowers from writing check loans in small amounts to pay bills which would otherwise have been paid from special deposit accounts.*

A $10 check on a special deposit account would be subject to an item charge of perhaps $.15. Without the authorized check credit charge of $.25, a similar check written on a revolving credit plan and paid off after one month would cost the customer only $.10 (1% per month times $10). By permitting a higher check charge than the one normally made by banks on demand deposit checks, the Legislature contemplated that the customer would be encourged to use his revolving account only for loans of magnitude sufficient to justify to him the possible payment of the $.25 charge.

Similarly, the statute (in paragraph (d)) permits the loan agreement to stipulate a minimum payment of $20. This provision, enacted in recognition of the fixed costs involved in the administration of these programs, is intended to allow banks to require prompt payment of small balances. Paragraph (d) also authorizes the bank to calculate its minimum payment as a percentage of the credit line, rather than the balance outstanding. Again, the objective is to discourage use of these programs for small loans repayable over extended periods.

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* *Statement of Richard Simmons, supra.* ("Such 25 cent fee is warranted in order that revolving credit plans will not be used as a device to avoid imposition of a charge upon checks drawn on a special checking account.")

We submit that a loan agreement restricting the amounts of loans which the bank will make and providing, through the medium of reasonable multiples, for minimum amounts of loans, when the customer chooses to use the overdraft procedure is consistent with and authorized under these provisions of the statute.

It is also significant to note that although the subdivision imposes various other restrictions on the provisions which may be included in the loan agreement, it nowhere prohibits a bank from prescribing minimum loan amounts or specified multiples. As a result, such provisions have been adopted by the vast majority of the banks in New York State which offer revolving check plans.

Even if there were a question of the right of the bank to require that loans be taken down in prescribed multiples, it would not be controlling here. The plaintiff was not "forced" to take loans in multiples of $100. The Loan Agreement offered him an alternative method of obtaining loans pursuant to which a credit would be made in the precise amount requested. He had the sole option as to the type and amount of loan which would be obtained.

The District Court in its decision apparently both ignored this alternative method of obtaining loans and misread the statutory reference to "honoring one or more checks or other written orders or requests of the borrower." The Court held that an advance in a multiple of $100 "does not constitute honoring a check." Although the decision stops at that point, completion of the analysis leads to the conclusion that there is no way in which an overdraft plan could work under this statute. We may assume, for example, that a customer with a $60 balance in his deposit account wishes to write a check for $80. If the bank "honors" the check as written and makes an $80 loan, it would violate that portion of the decision which holds that transferring the extra $20 to the checking account is not a

loan. If, on the other hand, the bank were to transfer only $60, the amount necessary to bring the deposit account to a zero balance, it would, in the words of the District Court, not be "honoring" the check.

The reasoning in the decision below on that point fails because it does not recognize that the deposit account check for $80 is not a "check" for the purposes of § 108.5, but is instead a "written request" for a loan to be made in accordance with the terms of the underlying loan agreement.

II. The District Court erred in holding that the transfer to the demand deposit account of the difference between the amount of the overdraft and the next highest multiple of $100 was not a loan until it was withdrawn from the deposit account.

This holding is contrary to the specific language of the statute. Paragraph (f) of § 108.5 provides that the loan may be "disbursed" by crediting its amount to a demand deposit account. If the District Court's theory were correct, even a loan in the exact amount requested by the customer could not be made simply by transfer to the demand deposit account. This is clearly contrary to the precise statutory wording.

Moreover, the Court was incorrect in implying that "credit" available under the Checking Plus Account was no different from credit in a demand deposit account. The Checking Plus Agreement could be terminated at any time by either party. Under its provisions, the bank had the right to cancel plaintiff's available unused Checking Plus credit and not to honor orders thereafter presented against that credit. Plaintiff's credit in his demand deposit account, however, is of a different nature. A bank is obliged under Section 4-402 of the Uniform Commercial Code to honor checks presented on a checking account which are properly drawn by signatories on that account. It is clear

that the legal relationship between the parties is substantially altered in favor of plaintiff by a transfer of funds from potential credit available under the Checking Plus Account to the demand deposit account.

III. The Plan at issue and particularly the agreement to make overdraft loans in multiples of $100 has received administrative approval.

As noted above, and in the affidavit submitted by counsel to this Association, in connection with its petition to file this brief, Amicus Curiae, numerous banks in New York have operated plans with similar provisions with respect to overdraft loans in multiples of $100 for a number of years. All of these banks are subject to periodic examination either by the New York State Banking Department, Federal regulatory agencies, or both. To the knowledge of this Association, after investigation, no bank operating such a plan has had its legality questioned by any of the examining agencies, although the existence and operation of these plans are regularly reviewed by such agencies. While obviously not binding upon this Court, the implicit approval of such plans by the administrative agencies charged with the supervision and enforcement of this statute is entitled to substantial weight.

CONCLUSION

Wherefore, for the foregoing reasons, the District Court's decision should be reversed.

April 8, 1974

Respectfully submitted,

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